Supreme Court, U.S.
FILED
JUN 4 - 2009
OFFICE OF THE CLERK

130

(3)

No. 08-884

IN THE

Supreme Court of the United States

LAWRENCE S. BERGER; REALTY RESEARCH CORPORATION, PETITIONERS

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

DENNIS CALO
Counsel of Record

FRANK AGOSTINO
JAMES J. BONICOS

Calo Agostino, P.C.
The Bank House
14 Washington Place
Hackensack, NJ 07601
(201) 488-5400

Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141

TABLE OF CONTENTS

Page

ARGUMENT 1

I.Respondents wrongly suggest that certiorari should not be granted because the Third Circuit's opinion was unpublished and designated as "non-precedential." 1

II.There is no support for Respondents' argument that the Third Circuit reviewed Petitioners' FOIA claims *de novo*. 2

III.The text of Exemption 6 and the prior decisions of this court do not compel the conclusion that a public employee has a right of privacy in purely work-related records which touch upon no aspect of the employee's private life 4

IV. Respondents argument that a "slight" privacy interest is sufficient to shield a document from disclosure under Exemption 6 ignores the exemption's "clearly unwarranted" language. 6

V. Respondents erroneously contend that the public interest will not be advanced by the disclosure of the disputed time-records. 8

VI. Respondents' Privacy Act arguments are all without merit. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

ABDELFATTAH V. DEP'T OF HOMELAND SEC., 488 F.3D 178, 182(3D CIR. 207) 4
CITY OF CANTON, OHIO V. HARRIS, 489 U.S. 378 (1989) 2
DEP'T OF AIR FORCE V. ROSE, 425 U.S. 352, 377 (1976) 5, 6
DEP'T OF DEFENSE V. FLR A, 510 U.S. 487, 497 (1994) 5, 7, 8
DEP'T OF JUSTICE V. REPORTERS COMMITTEE FOR FREEDOM OF PRESS, 489 U.S. 749 (1989) 5, 6, 8, 9
DEP'T OF STATE V. RAY, 502 U.S. 164, 167-170 (1991) 5, 7
DEP'T OF STATE V. WASHINGTON POST CO., 456 U.S. 595, 598 (1992) 5, 7
DOE V. U.S., 487 U.S. 201 (1988) 2
HALPERN V. FBI, 181 F.3D 279, 287 (2D CIR. 1999) 4
HOUSTON V. LACK, 487 U.S. 266 (1988) 2
KOKKONEN V. GUARDIAN LIFE INS. CO. OF AMERICA, 511 U.S. 375 (1994) 2
LAME V. DEP'T OF JUSTICE, 767 F.2D 66, 70 (3D CIR. 1985) 3
NATIONAL ARCHIVES AND RECORDS ADMIN. V. FAVISH, 541 U.S. 157, 166 (2004) 5
PORTLAND GOLF CLUB V. C.I.R., 497 U.S. 154 (1990) 2
VOELKER V. IRS, 646 F.2D 332, 334 (8TH CIR. 1981) 10

RULES

Supreme Court Rule 10 1

ARGUMENT

I. Respondents wrongly suggest that certiorari should not be granted because the Third Circuit's opinion was unpublished and designated as "non-precedential."

At several points, Respondents' brief notes that the opinion for which certiorari is sought was unpublished and designated as "non-precedential." Br. 3, 4, 6, 7. Respondents' apparent purpose in bringing this to the Court's attention is to suggest that it weighs against granting certiorari. This argument is without merit for several reasons.

First, Supreme Court Rule 10, which sets forth the primary factors which should be considered in deciding whether to grant certiorari, does not state that an opinion's unpublished or non-precedential status is a factor in that decision. Rather, the rule merely requires, *inter alia*, that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter...." Sup. Ct. Rule 10(a). The Third Circuit's opinion meets that criteria because the standard of review it used to decide Petitioners' appeal under the Freedom of Information Act ("FOIA") conflicts with the standard used by other circuits.

Second, Rule 32.1 of the Federal Rules of Appellate Procedure does not allow the circuit courts to prohibit litigants from citing unpublished or "non-precedential" decisions issued on or after January 1, 2007. Fed. R. App. P. 32.1. Since the Third Circuit's opinion was issued on August 11, 2008, litigants will be permitted to cite it in future cases which this court has

a clear interest in preventing because the opinion contains an incorrect statement of the law.

Third, Respondents contend that the opinion reflects Third Circuit precedent regarding the standard of review applicable to FOIA appeals. Br. 6. As such, it is an appropriate vehicle for Petitioners to challenge that precedent.

Fourth, on numerous occasions this Court has granted certiorari to unpublished opinions. See *e.g.*, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Portland Golf Club v. C.I.R.*, 497 U.S. 154 (1990); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Houston v. Lack*, 487 U.S. 266 (1988). The Court has even granted certiorari, as it is being asked to do here, to an unpublished opinion for the specific purpose of settling a conflict among the courts of appeals. *Doe v. U.S.*, 487 U.S. 201 (1988).

Given the foregoing, the fact that the underlying opinion was unpublished and designated as "non-precedential" should have no bearing on this Court's decision to grant or deny certiorari.

II. There is no support for Respondents' argument that the Third Circuit reviewed Petitioners' FOIA claims *de novo*.

Respondents concede that the two-tier standard of review articulated by the Third Circuit "is the subject of a division of authority among the courts of appeals." Br. 5. Of course, such a conflict would make this case a clear candidate for review by the Supreme Court. To avoid that result, Respondents claim that the Third Circuit did not use the two-tier standard to determine whether the district court properly applied FOIA Exemption 6 but instead used a *de novo*

standard. Br. 5. This assertion simply has no basis in the court's opinion.

Nowhere in the opinion did the Third Circuit state that a *de novo* standard applied to its review of the district court's application of Exemption 6. Rather, it **only** discussed the two-tier standard. Pet. 4a. Moreover, the court indicated that the standard applies generally to **all** appeals from summary judgment decisions in FOIA cases, regardless of the particular FOIA exemption involved. Pet. 4a. The court's use of the two-tier standard to determine whether the district court properly applied Exemption 6 would be consistent with its past pronouncement that the second prong of the standard requires it to determine "if the **conclusion of the trial court** is clearly erroneous." *Lame v. Dep't of Justice*, 767 F.2d 66, 70 (3d Cir. 1985)(emphasis added). In a FOIA case, the "conclusion of the trial court" which is usually reviewed on appeal is its determination whether documents are exempt from disclosure under the FOIA. The Third Circuit has acknowledged that it applies the two-tier standard to that issue. *Sheet Metal Workers*, 135 F.3d at 896 ("the two tiered standard of review of the district court's determination that a particular document is or is not properly subject to exemption does not, of course, preclude plenary review of issues of law.").

Respondents apparently believe that the Third Circuit could not have used the two-tier standard because they consider the Exemption 6 balancing test a question of law which should be reviewed *de novo*. Br. 6. This belief is unfounded because, although the Third Circuit has made off-hand pronouncements that questions of law should be reviewed *de novo* in FOIA appeals, neither the opinion for which review is sought nor the circuit's prior caselaw demonstrate that it

considers the balancing test a question of law. To the contrary, the fact that it only discussed the two-tier standard in this case suggests that it treats the issue as a question of fact.

Respondent also erroneously contends that the Third Circuit only uses the two-tier standard to evaluate a district court's "factual findings based on an *in camera* review of the underlying documents." Br. 6. That cannot be correct, because the district court in this case did not perform an *in camera* review (Pet. 22a) and yet the Third Circuit's opinion focused exclusively on the two-tier standard. Moreover, the court has previously applied that standard to cases which did not involve *in camera* review by the district court. *Abdelfattah v. Dep't of Homeland Sec.*, 488 F.3d 178, 182(3d Cir. 2007); *Sheet Metal Workers*, 135 F.3d at 896.

In sum, the Third Circuit's opinion plainly indicates that it reviewed Petitioners' FOIA claims using the two-tier standard. That approach is in direct conflict with those circuits which use a *de novo* standard. See *e.g.*, *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999). Therefore, Petitioners respectfully request that certiorari be granted to resolve this conflict.

III. The text of Exemption 6 and the prior decisions of this court do not compel the conclusion that a public employee has a right of privacy in purely work-related records which touch upon no aspect of the employee's private life.

Respondents contend that Exemption 6's reference to "personnel" files shows that it was intended to protect purely work-related documents.

Br. 7. This argument is dubious however, because an employee's personnel file also contains information which is not work-related but which only concerns the employee's private life or personal attributes. *Dep't of Air Force v. Rose*, 425 U.S. 352, 377 (1976)("these summaries.... do not contain the 'vast amounts of personal data,' ... ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance.").

Respondents also contend that the Supreme Court's past decisions establish that the exemption was meant to protect purely work-related documents. Br. 8. However, the cases cited by Respondents on this point do not support that conclusion because, unlike this case, the contested information in those cases concerned some aspect of the private life or personal attributes of the persons who were resisting disclosure. See *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 166 (2004); *Dep't of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749 (1989); *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 598 (1992); *Dep't of Defense v. FLR A*, 510 U.S. 487, 497 (1994); *Dep't of State v. Ray*, 502 U.S. 164, 167-170 (1991); *Rose*, 425 U.S. 352 supra.

Respondents' misleadingly claim, on the basis of *Dep't of Air Force v. Rose*, that "[t]he Court has likewise held that Exemption 6 contemplates redaction of purely work-related information in the form of case summaries of honor code violations by Air Force Academy cadets to protect the personal privacy of those government employees." Br. 8. That case does not support this conclusion because the case summaries at issue in *Rose* did not concern purely work-related

activities as do the time-records in this case. Instead, the summaries concerned violations of the Academy's honor code and therefore reflected upon the cadets' personal capacity for honesty and integrity. *Id.* at 358. In that manner, the summaries were more like the criminal "rap sheets" which were protected from disclosure in *Reporters Committee* than the time-records which are at issue in this case. *Reporters Committee*, 489 U.S. 749 supra.

Unlike the "rap sheets" and case summaries in the foregoing cases, the disputed time-records in this case would not be expected to contain information which would reveal any negative character trait, personal attribute or aspect of Williams' private life. If the records did, such information could be easily excised from the documents. For the most part, the records would simply be expected to reveal the time Williams spent and activities she performed with respect to her investigation of Petitioners. Petitioners respectfully contend that the release of such mundane information does not implicate the same level of privacy interests which were at stake in this Court's past decisions construing Exemption 6, and therefore certiorari should be granted to clarify the limits of the exemption.

IV. Respondents argument that a "slight" privacy interest is sufficient to shield a document from disclosure under Exemption 6 ignores the exemption's "clearly unwarranted" language.

Respondents contend that even a " very slight" privacy interest is enough in the face of a sufficiently small public interest to protect a document from disclosure under Exemption 6. Br. 9. The problem

with this argument is that it makes the balancing test required by Exemption 6 the functional equivalent of the balancing test required Exemption 7(C).

Because Exemption 6 requires a "clearly unwarranted" invasion of personal privacy and Exemption 7(C) only requires an "unwarranted" invasion of personal privacy, this Court has recognized that the former requires a greater showing of invasion of privacy than the latter. *Dep't of State v. Ray*, 502 U.S. at 172. This means that if, as Respondents contend, a "very slight" privacy interest is able to tip the balance in favor of non-disclosure under Exemption 6, then an even less significant privacy interest would be sufficient to tip the balance under Exemption 7(C). Since it is difficult to conceive of a lesser interest than a "very slight" interest, in practice, Respondents' approach would make the balancing tests under both exemptions essentially the same which conflicts with this Court's prior holding that Exemption 6 requires a greater showing. Respondents' approach also minimizes the significance of the "clearly unwarranted" language which is inconsistent with the Court's past recognition of the importance of that language as the primary means of holding Exemption 6's protection "within bounds." *Washington Post Co.*, 456 U.S. at 599-600.

Respondents' contention that *Dep't of Defense v. FLRA*, supports its argument on this point is unpersuasive because the Court's statement, relied on by Respondents, that "a very slight privacy interest would suffice to outweigh the relevant public interest," was merely *dicta*. 510 U.S. at 500. The Court actually found that the employees' privacy interest at stake in the case "in nondisclosure of their home addresses **substantially outweighs** the negligible FOIA-related

public interest in disclosure." *Id.* at 502 (emphasis added). Therefore, if anything, the decision supports Petitioners' argument that more than a *de minimus* privacy interest must be implicated for a document to be shielded from disclosure by Exemption 6.

V. Respondents erroneously contend that the public interest will not be advanced by the disclosure of the disputed time-records.

Respondents contend that the disclosure of the time-records will serve no public interest because the records of a single IRS employee will do little to advance the public understanding of the activities of the agency as a whole. Br. 10-11. This argument is flawed because it fails to recognize that the IRS does not conduct tax examinations in an *ad hoc* manner but instead does so pursuant to established agency procedures and protocol. See Internal Revenue Manual, Part 5 and Part 9. Therefore, the manner in which a single tax examination is performed may be deemed to be representative of all similar tax examinations. As such, the release of Williams' time-records will reveal information regarding tax examinations in general.

Since the time-records in this case were created by a federal employee in furtherance of a federal agency's official duties, they clearly reflect the internal operations of the government to a much greater extent than the records at issue in the cases cited by Respondents. *Reporters Committee*, 489 U.S. 749 (criminal records of a private citizen); *Dep't of Defense v. FLRA*, 510 U.S. at 497 (home addresses of agency employees). As such, the records will sufficiently "she[d] light on an agency's performance of its

statutory duties" to justify their release under Exemption 6. *Reporters Comm.*, 489 U.S. at 773.

VI. Respondents' Privacy Act arguments are all without merit.

Respondents raise essentially three arguments against Petitioners' contention that the time-records should have been released under the Privacy Act. All of these arguments are equally without merit.

First, Respondents contend that the evidentiary record does not show that the time-records pertain to Petitioner Berger. Br. 12. This however, is contradicted by the Third Circuit's opinion which noted that the time-records reflected, among other things, the time Williams spent "investigating other taxpayers **as well as appellants**..." (Pet. 8a)(emphasis added). The district court noted the same, stating that the time-records "concerned all of Williams' job functions, **not just those pertaining to the investigation of Plaintiffs**." (Pet. 45a)(emphasis added). To support its argument on this point, Respondents claim that the declaration submitted to the district court by the IRS which described the time-records did not admit that the records included information pertaining to Berger but merely reflected, among other things, the time Williams spent "examining various taxpayers." Br. 12. This argument is unpersuasive because the same declaration does not deny that Berger was one of the "various taxpayers" examined by Williams. C.A. App. 388. Moreover, if the time-records did not pertain to Berger, the IRS never would have collected the records in response to Petitioners' FOIA request which demanded records "pertaining to themselves and to the investigations of them..." Pet. 2a.

Respondents next imply that the Third Circuit concluded, as a factual matter, that the records did not pertain to Berger. Br. 12. It did not. Rather, the Third Circuit concluded, as a legal matter, that the time-records did not pertain to Berger because it considered the records to have been created "pursuant to the conditions of [Williams'] employment" and not in connection with her examination of Petitioners. Pet. 8a.

Lastly, Respondents contend that *Voelker v. IRS*, 646 F.2d 332, 334 (8th Cir. 1981) does not support the release of the records because "[e]ven if a portion [of the time-records] refers to Berger, *Voelker* merely supports the proposition that Williams (not Berger) would be entitled to have access to all of her time records, even if portions mention other individuals." Br. 13. The flaw with this argument is that it presumes that the time-records only pertain to Williams and therefore may be deemed "her" records. The *Voelker* decision does not support this position.

The plaintiff in *Voelker* was an IRS attorney who requested records pertaining to the agency's investigation of him. As here, the IRS refused to comply with the request based on its contention that the records pertained to a third-party and therefore the third-party's permission was required to release the records. *Id.* at 333. The Eighth Circuit rejected this argument, noting that "it defies logic to say that information properly contained in a person's record does not pertain to that person, even if it may also pertain to another individual." *Id.* at 334. The case therefore supports the proposition that, for purposes of the Privacy Act, an investigatory file may be deemed to be "about" the individual who was the target of an agency's investigation as well as the author of the file.

This conclusion is supported by *Topuridze v. United States Information Agency*, which specifically recognized that a document can be both "about" its author and the person who is the subject of the document and therefore be accessible to each under the Privacy Act. 772 F.Supp. 662, 665 (D.D.C.1991). To hold otherwise, the court noted in *Topuridze*, "could lead to results contrary to the purposes of the Privacy Act" because "[o]nly the government would have access to a record pertaining to more than one individual." *Id.* at 666.

Even though Williams was the author of the time-records at issue in this case, the Petitioners were the subject of those records because they were the target of her investigation. Therefore, Petitioners have a sufficient connection to the records to demand their release under the Privacy Act and it is respectfully requested that certiorari be granted to make this point clear.

CONCLUSION

The current Presidential Administration recently reaffirmed the importance of the FOIA as "the most prominent expression of a profound national commitment to ensuring an open Government." Memorandum of January 21, 2009 - Freedom of Information Act, Presidential Documents, 74 Federal Register 15 (26 January 2009), p. 4683. As such, this petition is especially timely and Petitioners respectfully request that certiorari be granted.

Respectfully
submitted,
DENNIS CALO
Counsel of Record

FRANK AGOSTINO
JAMES J. BONICOS
Calo Agostino, P.C.
The Bank House
14 Washington Place
Hackensack, NJ 07601
(201) 488-5400
Attorneys for
Petitioners